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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 568

MACKAY RADIO AND TELEGRAPH COMPANY, INC.,
Petitioner,

v.

RCA COMMUNICATIONS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
and
BRIEF IN SUPPORT THEREOF

JOHN W. DAVIS
15 Broad Street
New York 5, N. Y.

JAMES A. KENNEDY
JOHN F. GIBBONS
67 Broad Street
New York 4, N. Y.
Attorneys for Petitioner

BURTON K. WHEELER
RALPH M. CARSON
Of Counsel

New York, N. Y., January 26, 1953

INDEX

TABLE OF CASES CITED

STATUTES AND OTHER AUTHORITIES CITED

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Mackay Radio and Telegraph Company, Inc., a Delaware corporation (designated Intervenor in the Court below), respectfully prays the issuance of a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the opinion and judgment of that Court rendered herein on November 6, 1952, one judge dissenting. The action to be reviewed reversed a decision and order of the Federal Communications Commission which had granted petitioner licenses to operate direct radio-telegraph circuits between the United States and (a) The Netherlands and (b) Portugal (R. 550-654).

SUMMARY STATEMENT OF MATTER INVOLVED

Petitioner (hereinafter called Mackay) is a common carrier of international radiotelegraph communications and operates direct radiotelegraph circuits between the United States and many foreign countries (R. 555, 562). It is a subsidiary of American Cable & Radio Corporation and is a sister company of (a) The Commercial Cable Company which operates submarine cables across the North Atlantic and (b) All America Cables and Radio, Inc. which operates submarine cables between the United States and Latin America and international radio communication circuits in Colombia and Peru. Respondent RCA Communications, Inc. (hereinafter called RCAC), which opposed Mackay's applications before the Federal Communications Commission, also is a common carrier of international radiotelegraph communications and operates direct radiotelegraph circuits between the United States and many foreign countries including The Netherlands and Portugal (R. 558).

After extensive hearings upon Mackay's applications filed in 1946, the Federal Communications Commission on February 21, 1951 granted said applications to operate direct radiotelegraph circuits between the United States and The Netherlands and between the United States and Portugal in competition with existing direct circuits of RCAC. The Commission's action, following an exhaustive examination of all the evidence, was founded upon its determination that the statutory standard "public interest, convenience, or necessity" would be served thereby. At the same time and in the same proceeding the Commission denied another application of Mackay to operate a circuit between

the United States and Surinam, which action is not involved in this petition.

In granting Mackay the circuits to The Netherlands and Portugal, the Commission based its decision largely upon findings that competition is the national policy in the field of international telegraph communication; that the granting of Mackay's applications would create radiotelegraph competition with RCAC by means of direct circuits with The Netherlands and with Portugal without endangering the ability of RCAC to continue in service; and that the introduction of such competition would be in the public interest.

Mackay established the direct circuit with Portugal on March 12 1951, and with The Netherlands on June 21 1951, and they have since been and are now in regular operation.

RCAC appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit. That Court, in a divided decision (two judges to one) on November 6, 1952, reversed the Commission upon the ground that its finding that competition would be in the public interest was unwarranted in the face of a basic finding that Mackay's service over the new circuits would not be at lower rates or superior to existing service of RCAC. The Court was influenced in this decision by its interpretation (concerning which the judges differed) of the significance of the so-called *Oslo* case, viz: *Mackay Radio & Telegraph Company v. Federal Communications Commission* (C. A. D. C., 1938) 97 F. 2d 641.

The Commission found that Mackay was fully qualified to render adequate service (R. 628-9), and that the granting of the applications would not impair the financial standing or ability of RCAC or any other carrier to compete

(R. 607). It also found that a grant of the applications, while resulting in some decrease in cable competition, would increase over-all competition for telegraph traffic generally, and would introduce more effective competition between radiotelegraph carriers serving the points involved (R. 606-607; see also R. 628-629).

The Commission also said:

> "The national policy of the United States is one favoring competition. This policy is reflected in the anti-trust laws and is based on the principle that competition is generally more desirable than monopoly. Competition can generally be expected to provide a powerful incentive for the rendition of better service at lower cost" (R. 623).

The Court of Appeals, in reversing the decision and order of the Commission, left its findings intact. The Court, in other words, came to a different determination concerning the public interest, convenience, or necessity from that reached upon the same findings of fact by the administrative body to which that determination is committed by Congress.

BASIS OF THIS COURT'S JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code, 62 Stat. 928, as provided in Sec. 402(j) of the Communications Act of 1934, as amended, 47 USC § 402(j).

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit were entered November 6 1952. That Court by orders of December 5, 1952 and January 13, 1953 stayed the certification of its opinion and judgment to and including January 26, 1953.

QUESTIONS PRESENTED

1. Did the Federal Communications Commission commit error of law in treating competition, where reasonably feasible, as a determinative element of the public interest, convenience, or necessity under the Communications Act of 1934?

2. Does the absence of specific findings that proposed radiotelegraph circuits will produce lower rates or speedier, superior, or more comprehensive service to the points involved, make it error as matter of law for the Federal Communications Commission to license new circuits to those points in the belief that competition will provide incentive for the rendition of better service at lower cost?

3. Can the Court of Appeals, upon accepting as supported by the evidence all the basic findings of the Federal Communications Commission, properly substitute its judgment for that of the Commission in determining whether the public interest, convenience, or necessity, is served by the licensing of radiotelegraph circuits?

4. Did the Court of Appeals, by affirming the Federal Communications Commission in its denial of a license for competitive circuits, in the *Oslo* case in 1938 (*Mackay Radio & Telegraph Company* v. *FCC*, 97 F. 2d 641) so fix the statutory criteria that the Commission cannot now license competitive circuits upon substantially similar, together with additional, basic findings?

REASONS FOR GRANTING THE WRIT

1. This petition presents the first opportunity for this Court to pass directly upon the content of the legislative standard of "public interest, convenience, or necessity" in the field of international common carrier radio communication. The action of the Court of Appeals in this instance makes an interpretation of this legislative standard a matter of public importance. The decision below, unless corrected by this Court, will tend to fix the content of the legislative standard as minimizing, if not indeed negativing, competition, and involves an important issue of substance arising under the Communications Act. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 US 470, 474. It constitutes a precedent of general application with respect to the enforcement of an act national in scope. *Del Vecchio* v. *Bowers*, 296 US 280, 285.

2. The decision sought to be reviewed sets up a new principle contrary to that heretofore laid down by this Court in relation to Interstate Commerce Commission regulation of service-extensions requiring certificates of public interest and necessity. This Court has held that common carrier communication by telephone and telegraph is regulated under the Communications Act by analogy with Interstate Commerce Commission regulation of rail and other carriers. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 474. In the transportation cases it has been held uniformly that the availability of adequate facilities of other carriers need not deter the Commission from authorizing competitive service where it can be done without undue prejudice to such other car-

riers, as the Commission specifically found in the present case (R. 581, 594, 607).[5] This Court has said that in such circumstances the administrative determination is not to be interfered with. *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35, 42; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60; *American Trucking Associations* v. *United States*, 326 U. S. 77; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515.

This case importantly involves the essential philosophy of competition which underlies the Sherman Antitrust Act. By providing for direct appeals to this Court of all cases arising under the Sherman Act, Congress explicitly recognized the general importance to be attached to cases involving the philosophy of competition. The reviewable requirement of all Sherman Act cases by this Court strongly suggests the propriety of a review of this case which is so fundamentally one involving antitrust considerations.

3. The Court below has disregarded a vital national policy under the Communications Act and an important interest of national security in discountenancing the introduction of competition in direct radio circuits to Portugal and The Netherlands. This policy is reflected in Sec. 313 of the Act, 47 USC § 313 (quoted at p. 13 below), whereby the antitrust laws are "declared to be applicable to . . . interstate ~~and~~ or foreign radio communications".

Mackay was organized, in the words of the report of the President's Communications Policy Board (*Telecommunications—A Program for Progress*—Report to the President; March 1951), "to challenge RCAC's monopoly in the world-wide radiotelegraph service" (p. 132). That report also pointed out the defense aspects of the matter (p. 129):

"Officials with a primary responsibility for national security are eager that as many international circuits as possible are kept in operation."

The Commission's action, reversed by the Court below, was directed to implement this Congressional policy in relation to two important traffic centers. It pointed out that in the first half of 1947 Portugal ranked thirteenth for outbound traffic and fourteenth for inbound traffic, and that The Netherlands ranked eighth among 89 countries in the area of Europe, Africa and the Near East for which traffic data are separately reported (R. 629).

With respect to both The Netherlands and Portugal, RCAC has a monopoly of direct radio telegraph service (R. 596, 604). Mackay in 1947 handled virtually no traffic with The Netherlands and by virtue of its indirect circuit through Lima, less than five percent of the traffic with Portugal (R. 612). Hence the decision by the Commission brought about for the first time competition through direct facilities between two American radiotelegraph carriers for traffic between the United States and these important centers. The reversal of that decision by the Court of Appeals poses a problem of great consequence in view of the public policy and the security interest involved in the opening of parallel international circuits.

4. The Court of Appeals, in substituting its judgment for that of the Federal Communications Commission upon the same findings, has contravened the established rule with respect to appeals from administrative determinations. In this the Court below has violated the injunction laid upon appellate courts in administrative matters by this Court in *Federal Radio Commission* v. *Nelson Brothers*

Bond & Mortgage Co., 289 U. S. 266, 277, 285; *Securities and Exchange Commission* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 126; *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 522; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82; *Gray* v. *Powell*, 314 U. S. 402, 412; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 225; and like cases.

5. The Court below introduced a new and erroneous principle of decision in relying upon its previous holding in the *Oslo* case to overthrow an administrative determination. The *Oslo* case sustained the Commission's refusal to grant Mackay a duplicate radio circuit to Norway. That record, made in 1936, did not deter the Commission itself from coming to a different decision with respect to The Netherlands and Portugal on a record made in 1951 containing important new material. This new material is reflected in the Commission's findings as to the increase in volume of telegraph traffic since 1936 (R. 619), the strong trend from cable to radio (R. 620), consequent authorizations by the Commission of duplicating direct circuits since 1936 (R. 621), the effect of the operation of direct circuits on ability to develop traffic (R. 626), the improvement in Mackay's service from granting of the applications (R. 576, 596, 605-6), the increased importance of The Netherlands and Portugal as traffic centers (R. 629).

These new factors in the situation altered the judgment of the Commission in 1951 from what it had been in 1936 upon a similar application. The reviewing court was without authority to intervene, under the rule laid down by this Court in *United States* v. *Pierce Auto Freight Lines*, 327

U. S. 515, 536. Even more clearly the Court of Appeals was without authority to substitute its conclusions of 1938 (viz. the *Oslo* case) for the Commission's findings as of 1951 upon an amplified record.

CONCLUSION

For the foregoing reasons, more fully developed in the accompanying brief, it is submitted that the District of Columbia Court of Appeals has departed from the rule laid down by this Court and in other circuits on vital matters affecting the maintenance of competition and the development of administrative law; and that a writ of certiorari should issue accordingly for a review thereof at the hands of this Court.

Respectfully submitted.

JOHN W. DAVIS
15 Broad Street
New York 5, N. Y.

JAMES A. KENNEDY
JOHN F. GIBBONS
67 Broad Street
New York 4, N. Y.
Attorneys for Petitioner

BURTON K. WHEELER
RALPH M. CARSON
Of Counsel

New York, N. Y., January 26, 1953

In the

Supreme Court of the United States

October Term 1952

Mackay Radio and Telegraph Company Inc., *Petitioner*, *against* RCA Communications, Inc., *Respondent.*	No.

BRIEF IN SUPPORT OF FOREGOING PETITION

Statement of the Case

On May 29 1946 petitioner Mackay filed applications with the Federal Communications Commission for modification of license so as to establish direct radiotelegraph circuits with The Hague (later amended to Amsterdam), The Netherlands; Lisbon, Portugal; and Paramaribo, Surinam (R. 551). Exhaustive hearings ensued, participated in by Western Union as intervenor and by RCA Communications Inc., respondent RCAC herein. RCAC was at that time the only American company licensed to operate direct radiotelegraph circuits to Amsterdam, Lisbon, and Paramaribo (R. 569, 583, 598). On February 23 1951 the Commission released an extensive opinion granting the applications as to Portugal and The Netherlands, and denying that for Surinam (R. 560-654).

On appeal by RCAC, the Court of Appeals for the District of Columbia Circuit, one judge dissenting, reversed as to The Netherlands and Portugal. The remaining essential facts are summarized in the foregoing petition at pp. 2-4 above.

Opinions Below

The opinion of the Federal Communications Commission, not yet reported, was released February 23 1951 and appears at R. 550-654. The opinion of the District of Columbia Court of Appeals, filed November 6 1952, is not yet reported, but appears at R. 695-707.

Jurisdiction of This Court

The basis of this Court's jurisdiction is set forth in the petition at p. 4 above.

STATUTE INVOLVED

The statute involved is the Communications Act of 1934, as amended (48 Stat. 1085, 66 Stat. 715, 47 USC §§ 151, 309 *et seq.*). The pertinent provisions are as follows:

> "§ 151. Purposes of Act; Federal Communications Commission created
>
> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense,

for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

"Sec. 309.(a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

"Sec. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings

and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court."

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In refusing to accept the weight accorded by the Commission to competition in radiotelegraph service, as a national public interest.

2. In substituting its judgment for that of the Federal Communications Commission with respect to the public interest, convenience, and necessity upon the same basic findings.

3. In misconstruing its earlier decision in *Mackay Radio & Telegraph Co. Inc.* v. *Federal Communications Commission*, 97 F. 2d 641, and treating its then refusal to upset the administrative determination as warrant to interfere with a new administrative determination upon an amplified record.

Argument

POINT I

THE COURT BELOW ERRED, AND ITS DECISION WILL HAVE A HARMFUL EFFECT UPON FEDERAL COMMUNICATIONS REGULATION, IN FAILING TO RECOGNIZE THE VITAL PUBLIC INTEREST IN THE MAINTENANCE OF COMPETITION.

In granting Mackay's applications for Portugal and The Netherlands, the Commission laid weight on the fact that RCAC had a monopoly of the direct radio circuits to those points and that licenses to Mackay would improve the indirect service of Mackay and its affiliate The Commercial Cable Co. and would introduce competition in direct radiotelegraph communication. It noted that the national policy, reflected in the antitrust laws, favors competition and pointed out that by Section 313 of the Communications Act the antitrust laws are expressly "declared to be applicable . . . to interstate or foreign radio communications" (R. 623-4).

The Commission then explained from its experience in the field of international communications the importance of direct circuits to effective competition. It said that operation of direct circuits tends to improve the carrier's ability to secure inbound traffic, which in turn is claimed to enhance the ability to develop outbound traffic (R. 626). It pointed out that the existing competition by indirect circuits (whereby Mackay operates to Portugal through Peru and to Holland through London) is less efficient and desirable, entailing extra handling through relay points and slower service (R. 626).

> "It is difficult to find [said the Commission] that the public would benefit from an action on our part which would operate to forbid competition between radiotelegraph carriers except through indirect circuits." (R. 626)

In fact, the Commission concluded, the adoption of the single-circuit policy which RCAC urged upon it, would not only violate the spirit of the Communications Act and contravene the national policy but also accomplish what Congress has so far refused to permit by way of merger legislation (R. 627-628).

The lengthy opinion of the Commission traces in detail the rise and spread under its aegis of radiotelegraph competition between petitioner Mackay and respondent RCAC. Radio Corporation of America upon its organization in 1919 acquired the assets in the United States of Marconi Wireless Telegraph Company of America, an American company controlled by the British Marconi interests (R. 560). Before 1929, when Mackay entered the field, Radio Corporation of America had established direct radiotelegraph circuits between the United States and Hawaii, Great Britain and seven other foreign countries (R. 560). Radio Corporation of America at that time had a monopoly of radiotelegraph communication with foreign centers. In 1929 Mackay's first transoceanic circuits were opened, to Hawaii and Peru (R. 561). By the time of organization of the Federal Communications Commission in 1934, Mackay had 18 circuits with overseas countries in operation or authorized, and RCAC (which had taken over from its parent) had 40 circuits in operation (R. 560-561).

Under the regime of the Commission, with varying policies by the Board of War Communications during 1942-5 as to the establishment of duplicate circuits to foreign

countries, additional circuits were authorized for both companies, so that at the time of hearing RCAC had 65 circuits and Mackay 39 circuits with points throughout the world (R. 560-562). This growth of Mackay competition did not go unopposed. Not only did RCAC resist before the Commission the authorization of duplicating circuits to Mackay (as in the instant case and in the *Oslo* case), but it developed exclusive contracts with its foreign correspondents prohibiting them from dealing with any other United States carrier (R. 562-563). Negotiations begun by Mackay with The Netherlands as early as 1931, and also early negotiations with Portugal, were frustrated by these exclusive RCAC contracts (R. 40-5, 82-5, 495, 562-3). An amendment of 1935 to the consent decree in the United States District Court for Delaware in *U. S. v. Radio Corporation of America* enjoined RCAC from employing certain exclusive provisions in contracts with foreign correspondents (R. 44, 562). In 1943, the Commission itself took action to obtain a waiver by RCAC of contract provisions requiring its foreign correspondents to send all unrouted traffic over circuits of RCAC (R. 563).

Against this background the Commission concluded that the public interest would be served by opening up the Amsterdam and Lisbon circuits to direct competition (R. 606-607, 631), upon findings that Mackay is qualified (R. 605, 615) and that the proposed action would not endanger the ability of RCAC or Western Union to continue to render competitive international telegraph service (R. 607). Without the additional licenses Mackay is handicapped in seeking telegraph business from Portugal and The Netherlands, because the traffic from each is controlled by entities (Portuguese Marconi and The Netherlands Administration of Posts, Telephone & Telegraph)

having no stake in cable business and interested in developing radiotelegraph business (R. 580-581, 595-596, 606). The removal of Mackay's handicap will leave RCAC still in a strong position. In the first half of 1947 RCAC alone handled 31.7 per cent of the total international telegraph traffic of the United States, while Western Union (cable only) had 28.2 per cent, and the combined American Cable & Radio companies (viz. Mackay, Commercial Cable Company and All America Cables and Radio Inc.,—i. e. cable and radio combined) 31.6 per cent. These percentages represented for RCAC a great betterment of position as compared with 1936 (R. 615).

The more rapid progress of RCAC since 1936 is doubtless due in great part to the fact, found by the Commission, that there has in that time been a strong trend in international telegraph traffic from cable to radio. Whereas the cable carriers had 70 per cent of the United States international telegraph traffic in 1936, they had less than 50 per cent in 1946 while the radio carriers increased to 53.4 per cent in that year (R. 620). This development is due in part to the national and proprietary interest of many foreign telegraph administrations, who derive revenue from radio traffic but not from cable traffic (R. 620). It is a tendency, probably destined to continue, which makes it all the more important that Mackay, as the only radiotelegraph company in a position to compete with RCAC on a worldwide basis, be admitted into important areas in which RCAC now monopolizes the United States business.

So thought the Commission, as regards Portugal and The Netherlands. In support of its determination to open up those points to direct radiotelegraphic competition, it cited the national policy favoring competition (R. 623) and

the fact that traffic exchanged with The Netherlands and Portugal had greatly increased since 1936 (R. 619). It recognized that competition provides "a powerful incentive for the rendition of better service at lower cost" (R. 623). It cited the duty laid by this Court upon administrative bodies to consider the effect of the transactions they authorize upon the general competitive situation in the industry: *McLean Trucking Company* v. *United States*, 321 U. S. 67, 87 (R. 625).

The reversal of this forward-looking action by the Court below is a backward step which threatens serious harm to the future development of the American radiotelegraph industry. It threatens the spread of competition in direct radio communication between the United States and overseas points under Commission regulation. If not corrected by this Court, the decision below will kill future application of the liberal rule enunciated by the Commission in its extended opinion summarizing years of experience (R. 628):

> "We are of the opinion that in those instances where there is only one direct radiotelegraph circuit to a point, we should authorize a second competing radiotelegraph circuit where the applicant demonstrates that such competition is reasonably feasible."

By these words "reasonably feasible" the Commission was not innovating upon the legislative standard. It was merely summarizing by a convenient phrase its findings (a) that the volume of traffic is substantial (R. 570-1, 585, 619), (b) that the cost of the new circuits would not be too great (R. 602-3; 607), (c) that the competitive circuits will not endanger the ability of the existing carriers to serve (R. 581, 594, 607), and (d) that Mackay is capable of rendering adequate service (R. 576-7, 605-6).

POINT II

THE COURT BELOW ERRED IN USURPING THE DISCRETION OF THE FEDERAL COMMUNICATIONS COMMISSION UPON FINDINGS NOT ARBITRARILY OR CAPRICIOUSLY MADE AND BASED ON SUBSTANTIAL EVIDENCE.

The majority below in their decision left the Commission's findings undisturbed. They did not purport to set any finding aside as arbitrary or capricious, but held only that the Commission's determination as to the public interest, convenience, or necessity was not supported by the findings made. In this the majority manifestly erred, for the statutory standard in question was devised by Congress to be cut and fitted by the Commission alone according to the requirements of the special case. When fairly supported by substantial evidence, its findings in each case are conclusive, as provided by Section 10 (e) of the Administrative Procedure Act, 5 USC § 1009 (e), 60 Stat. 243. The Court of Appeals may not substitute its own judgment for the Commission as to what in a given case the facts found shall indicate the public interest, convenience, or necessity to be; the inference to be drawn is exclusively for the administrative body, and is not a question of law open to judicial review.

That the majority below really usurped the role and function of the Federal Communications Commission is evident from their statement: ". . . we agree with the dissenting Commissioners . . ." (R. 699). Now the opinion of the dissenting Commissioners shows that, adopting 12 findings of the majority which they describe (R. 641-643), they draw therefrom a different conclusion as to the "public

interest, convenience, or necessity," principally because of a difference in attitude toward competition for radiotelegraph circuits (R. 650-652).

But the choice of policy as to the extent and area of competition entering into the statutory standard, is committed by Congress to the Commission exclusively. It was manifest error for the Court below to intermix in that controversy and throw its weight into the balance of a purely administrative decision. As this Court said in *Radio Corporation of America* v. *United States*, 341 US 412, 420:

> "... the wisdom of the decision made can be contested as is shown by the dissenting opinions of two Commissioners. But courts should not overrule an administrative decision merely because they disagree with its wisdom."

The emphasis laid by the majority Commissioners upon competition as a dominant public interest in the administration of the Act was, as we have shown above, eminently sound. But, even if this were not so, any argument that the Commission's ruling was unreasonable or unwise or that its conclusions upon the testimony were incorrect, is not for a reviewing court. So this Court has many times pointed out on appeals from regulatory agencies. *Federal Radio Commission* v. *Nelson Bros.*, 289 US 266; *Swayne & Hoyt* v. *United States*, 300 US 297; *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 US 105; *National Broadcasting Co.* v. *United States*, 319 US 190; *Federal Communications Commission* v. *WOKO, Inc.*, 329 US 223.

While the Administrative Procedure Act, 60 Stat. 237, 5 USC §§ 1001 et seq., permits the reviewing court to set

aside an administrative decision when it cannot conscientiously find that supporting evidence is substantial, the majority below made no such declaration here. Indeed they could not, for the solid abundance of supporting evidence is manifest not only in the Commission's opinion but in its careful evaluation of opposing considerations (R. 550-632). This Court has said of the Administrative Procedure Act:

> "Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." (*Universal Camera Corp. v. NLRB*, 340 US 474, 488.)

It could not be clearer that the majority below have infringed this controlling principle of administrative review. They have ignored the Commission's findings that Mackay's direct communication with The Netherlands and Portugal will be an improvement over the indirect service of Mackay and its cable associate via intermediate relay at London, the Azores or Lima (R. 568-9, 582-3, 626-7). They have also ignored the findings about the doubling in volume of United States international telegraph traffic since 1936, such that even with Mackay's applications granted there would still be much more business per carrier for the points in question than there was in 1936 (R. 619). The majority below accept in all respects the Com-

mission's basic findings, including the finding that other carriers will not be endangered in their ability to provide competitive service, but conclude that its ultimate finding that authorization of the direct competitive circuits will serve public interest, convenience, or necessity must collapse in view of the findings that such circuits will not provide service at lower rates or superior to or more comprehensive than the existing direct service of RCAC. But the reviewing authority

> ". . . cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and applicable law." (*United States* v. *Pierce Auto Freight Lines Inc.*, 327 US 515, 535-6.)

See also *Chesapeake & Ohio Ry. Co. v. United States* 283 US 35, 42 and the other cases cited in the petition (p. 7 above) dealing with competitive service authorized by the Interstate Commerce Commission. The proper charter for Commission action was laid down by the dissenting judge in saying (R. 703-705):

> "I think that, when existing traffic permits more than one carrier, and where the existence of a second carrier would not endanger the stability or the service of the existing carrier, competitive service may well be in the public interest. If that be so, then where the necessary conditions are established, the question whether there should or should not be a second carrier is for the Commission to decide. . . If the business will support two operators, the regulatory authority has a wide discretion in determining whether to serve the public interest by

drastic supervision of a single operator or to install an automatic self-regulator in the form of a competitor."

To reject this flexible standard, as did the majority below, is certainly not to carry out the Congressional purpose "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission". *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 US 134, 138.

Conclusion

THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS ERRS ON VITAL POINTS AFFECTING THE MAINTENANCE OF COMPETITION AND FUTURE ADMINISTRATIVE DEVELOPMENT IN INTERNATIONAL COMMUNICATIONS OF THE UNITED STATES, AND REQUIRES REVIEW AT THE HANDS OF THIS COURT PURSUANT TO WRIT OF CERTIORARI TO BE ISSUED HEREIN.

Respectfully submitted,

JOHN W. DAVIS
15 Broad Street
New York 5, N. Y.

JAMES A. KENNEDY
JOHN F. GIBBONS
67 Broad Street
New York 4, N. Y.
Attorneys for Petitioner

BURTON K. WHEELER
RALPH M. CARSON
Of Counsel

New York, N. Y., January 26, 1953